Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

MARIO NIEMAN,

Petitioner,

v.

DRYCLEAN U.S.A. FRANCHISE COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, regulate conduct that occurs both in the United States and abroad but which relates to foreign commerce?

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OPINIONS BELOW

The opinion of the court of appeals is reported at 178 F.3d 1126 (11th Cir. 1999) (App. A). The opinion of the district court is unreported (App. B).

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on June 21, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), as enforced by private litigants under the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.204, provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 44 defines commerce to mean "commerce among the several states or with foreign nations."

STATEMENT OF THE CASE

Petitioner Mario Nieman ("Nieman") sued respondent in Florida Circuit Court in May of 1995. The lawsuit sought damages based on respondent's failure to refund a $50,000 deposit paid for the option to obtain the exclusive master franchise in Argentina for the "Dryclean USA" franchise. That deposit was paid by Nieman to respondent in Coral Gables, Florida. The case was subsequently removed to the United States District Court for the Southern District of Florida.

On cross-motions for summary judgment, the district court ruled in favor of Nieman, holding that respondent's failure to return the deposit was a violation of Section 5 of the Federal Trade Commission Act (the "FTC Act") and the rules promulgated under the FTC Act, and was therefore a violation of the Florida Deceptive and Unfair Trade Practices Act. The court of appeals reversed, holding, among other things, that the FTC Act did not apply due to the "extraterritorial" nature of the transaction. In so ruling, the Eleventh Circuit acknowledged a conflict between its ruling and the established law of the Seventh Circuit.

A. The Statutory Scheme for the Prevention of Unfair or Deceptive Practices

Section 5 of the FTC Act bars "unfair or deceptive practices." A violation of Section 5 of the FTC Act may be established by a showing of a violation of a rule promulgated by the FTC *or* by a showing that conduct in question is "unfair or deceptive." However, Section 5 of the FTC Act does not provide a private right of action for persons damaged by FTC Act violations.

Florida, like many states, provides a statutory cause of action for private litigants damaged by a violation of Section 5 of the FTC Act.[1] The Florida Deceptive and Unfair Trade

1. All fifty states and the District of Columbia have enacted one or more consumer protection statutes of general applicability. ABA Section of Antitrust Law, *Antitrust Developments* (4th ed. 1997), p. 654. While there are significant variations in the scope and content of these statutes from state to state, most of them prohibit "unfair or deceptive practices" or similar conduct. *Id.* Many of these statutes explicitly adopt the FTC Act or FTC precedents as standards of conduct. *See* ABA Section of Antitrust Law, *Reliance on FTC Consumer Protection Law Precedents in Other Legal Forums*, Working Paper No. 1 (1988).

Practices Act ("FDUPTA"), Fla. Stat. § 501.204, allows recovery of damages and attorneys' fees upon a showing of either a violation of an FTC Rule or a showing that conduct was "unfair or deceptive."

B. Proceedings Below

Nieman is a citizen of Argentina. Nieman signed an option contract with respondent in February of 1994, whereby he received the option for the exclusive Dry Clean USA master franchise for all of Argentina.

The option contract was initially negotiated during several meetings in Coral Gables, Florida, between the parties. Nieman was a resident of Florida at the time that negotiations with respondent began, but Nieman moved to Argentina before the execution of the option contract and the payment of the deposit. Final negotiations of the option contract took place telephonically between Coral Gables and Argentina. Ultimately, the option contract was signed by Nieman in Argentina and returned to respondent (with the deposit) in Coral Gables. The option contract was signed by respondent in Coral Gables.

In negotiating the option contract, respondent provided Nieman with a copy of its standard master franchise agreement. That proposed master agreement contained the following terms and conditions:

> This agreement shall be deemed made and entered into in Miami, Florida, U.S.A., and shall be governed by and interpreted in accordance with the laws of the United States of America and the State of Florida . . . [Nieman] agrees that all

> litigation initiated by Nieman to adjudicate a dispute under or in connection with this Agreement must be filed in the United States District Court for the Southern District of Florida or the courts of . . . the State of Florida.

Pursuant to the option contract, Nieman was required to pay respondent an initial $50,000 deposit, and was required to raise an additional $375,000 within a few months. Nieman was unable to raise the additional funds to make the $375,000 payment. Nieman requested that respondent return the initial $50,000 deposit, but respondent refused.

Nieman sued in Florida state court under several different legal theories, including a claim that respondent violated the FTC Act and FDUPTA by demanding a non-refundable deposit and failing to provide required disclosures under the FTC Act and the "FTC Franchise Rule" promulgated by the FTC pursuant to its rulemaking authority. After removal to federal court, all of Nieman's claims against respondent were voluntarily dismissed except for the FDUPTA claim.

The district court entered summary judgment in Nieman's favor, holding that respondent had violated the FTC Act and FDUPTA. The district court held that Nieman's claim was within the FTC Act's jurisdiction, citing *In Re Branch*, 141 F.2d 31 (7th Cir. 1944). As held by the district court:

> What the defendant suggests is that a U.S. franchisor may accept a $50,000 deposit from a foreign investor without making basic disclosures where it would be unlawful in a transaction involving a U.S. citizen. The defendant's

> argument is without merit. Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although *some* acts are done outside the territorial limits of the United States.

(App. B, 15a) (emphasis added).

The Eleventh Circuit reversed on two grounds. First, it held that the FTC Franchise Rule does not cover the sale of franchises to be located outside of the United States. (App. A, 9a-11a). Nieman does not seek review of this aspect of the Eleventh Circuit's opinion. Second, the Eleventh Circuit held that the "extraterritorial" nature of the transaction removes the transaction from the jurisdiction of the FTC Act. (App. A, 7a-9a).

REASONS FOR GRANTING THE WRIT

In this Petition, Nieman requests that the Court review the Eleventh Circuit's holding on the jurisdictional reach of the FTC Act (and, by implication, FDUPTA). Nieman seeks the opportunity to pursue his remedies under FDUPTA, and to litigate the question of whether respondent's conduct in Florida constitutes unfair or deceptive conduct under the FTC Act and FDUPTA. As noted by the district court, respondent failed to make "basic disclosures" (App. B, 15a) in its dealings with Nieman, and many of those dealings took place in Florida.[2]

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2. The sufficiency of pre-contract disclosures between franchisors and franchisees has been the subject of increasing judicial scrutiny outside the context of the FTC Franchise Rule. *See* Janet McDavid and Richard M. Steuer, "*The Revival of Franchise Antitrust Claims*," 67 Antitrust L. J., 209, 225 (1999), citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

Neither Nieman's foreign citizenship nor the location of the prospective franchises should absolve respondent from liability for deceptive negotiations that took place in Florida.

The Eleventh Circuit acknowledged that its decision on the extraterritorial application of the FTC Act is in conflict with the Seventh Circuit's decision in *Branch*.[3] The Eleventh Circuit's decision is erroneous, insofar as it ignores the plain purpose and language of the FTC Act and instead adopts a "balancing test" that would immunize illegal conduct which takes place in the United States if the primary situs of the underlying transaction is extraterritorial. Such a rule would drastically change the laws governing cross-border transactions, and would have a particularly adverse effect in international business centers such as Florida, California, Texas, and New York.

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3. As held by the Eleventh Circuit,

> It is true that the *Branch* court concluded that the FTC Act authorizes extraterritorial exercise of the FTC's unfair competition jurisdiction, which includes the Franchise Rule. However, *Branch* is not the law of this Circuit and is therefore persuasive authority at best. In view of subsequent Supreme Court decisions, we disagree with the *Branch* court's statutory analysis.

(App. A, 8a). The Eleventh Circuit was incorrect in its description of *Branch*, insofar as the *Branch* decision is based on the FTC Act's "unfair or deceptive" conduct jurisdiction, not its unfair competition jurisdiction. This is an important distinction, insofar as 15 U.S.C. § 45(3), the 1982 amendment to the FTC Act, narrows the unfair competition jurisdiction of the FTC Act.

I.

THE TEXT OF THE FTC ACT PROVIDES FOR CROSS-BORDER APPLICATION.

The jurisdiction enumerated in the FTC Act is quite broad. In the FTC Act, Congress "empowered and directed" the FTC "to prevent persons, partnerships, or corporations . . . from using unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). The Act defines "commerce" to mean "commerce among the several states or with foreign nations." 15 U.S.C. § 44.

Notably, Congress chose in 1982 to limit the "foreign" commerce reach of Section 5 of the FTC Act as it pertains to "unfair methods of competition" (i.e., antitrust) claims by adding the following amendment:

> This subsection shall not apply to unfair methods of competition involving commerce with other nations (other than import commerce) unless —
>
> (A) such methods of competition have a direct, substantial and reasonably foreseeable effect —
>
> (i) on commerce which is not commerce with foreign nations or import commerce with foreign nationals; or
>
> (ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

> (B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.
>
> If this subsection applies to such method of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.[4]

15 U.S.C. § 45(3).

The express language of 15 U.S.C. § 45(3) speaks to a *narrowing* of the jurisdiction of the FTC Act (through its "shall not apply . . . unless" language) *only* as applied to unfair competition claims. The only reasonable interpretation of this narrowing is to conclude that the jurisdiction of the FTC Act for unfair and deceptive practices is *broader* than the unfair competition jurisdiction of 15 U.S.C. § 45(3). Since even the narrow jurisdiction of 15 U.S.C. § 45(3) contemplates jurisdiction in cross-border commerce, jurisdiction should have been found in the instant case.

In its ruling, the Eleventh Circuit relied on *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), which held that the EEOC laws do not apply to employees of United States companies who work outside the United States.[5] The language and purpose of the FTC Act differentiate this case

4. In certain circumstances, the FTC Act allows for jurisdiction for unfair method of competition claims even when *all* acts have been performed outside the United States. *See* 15 U.S.C. § 64.

5. The holding in *Arabian American Oil* was legislatively superseded by the Civil Rights Act of 1991.

from *Arabian American Oil.* That case involved the interpretation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §§ 2000e-2000e-17. However, Title VII does not make any mention of applicability to foreign commerce or to the invocation of Congress' powers to regulate foreign conduct. Indeed, the Senate deleted the terms "foreign nation" and foreign commerce" from Title VII before that bill was passed. *See Arabian American Oil,* 499 U.S. at 250.

The cross-border application of the FTC Act does not rely upon boilerplate "affecting commerce" language, but instead reflects an intentional decision by Congress to regulate foreign commerce. While this Court has in the past read a single statutory reference to "foreign commerce" to be an insufficient basis for extraterritorial application, the statutes at issue in those cases did not contain the FTC Act's statutory language specifically narrowing and delineating the scope of the foreign commerce to be regulated. *See, e.g., New York Cent. R. Co. v. Chisholm,* 268 U.S. 29 (1925) (no jurisdiction under Federal Employers' Liability Act over damages action by United States citizen for train accident in Canada); *McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963) (National Labor Relations Act did not apply to foreign employees).

The Eleventh Circuit's opinion acknowledges Nieman's argument that "most if not all of the pertinent conduct subject to regulation occurred in Florida." (App. A, 5a at n.4). However, the Eleventh Circuit effectively immunized respondent's Florida conduct by holding that, since the primary focus of the relationship of the parties was

Argentinean, "[u]nder the circumstances of this case, if the Franchise Rule is to apply at all, it must apply extraterritorially. . . . Thus, for the Franchise Rule to have extraterritorial application, Congress must have intended the FTC Act to apply extraterritorially." *Id.*

The Eleventh Circuit's opinion imposes a balancing of interests test (similar to a conflict of laws analysis) which is contrary to the FTC Act, and contrary to the Seventh Circuit's holding in *Branch*. *See Branch,* 141 F.2d at 35 ("The Federal Trade Commission . . . seeks to protect petitioner's competitors from his unfair practices, begun in the United States and consummated in Latin America."). Simply put, if unfair or deceptive conduct takes place in the United States and affects United States commerce, the FTC Act should apply to that conduct even if additional improper conduct takes place outside the United States.

II.

THIS ISSUE HAS IMPORTANT RAMIFICATIONS FOR THE ENFORCEMENT OF THE FTC ACT AND RELATED STATE STATUTES.

Branch has been the final word on the application of the FTC Act for over 50 years. The rule put forth by the Eleventh Circuit would impose significant burdens on the prosecution of violations of the FTC Act by the FTC, by state regulators, and by state law private plaintiffs such as Nieman. Up until now, state unfair trade practices acts and state "baby FTC Act" claims had been regularly utilized across the nation to prosecute and/or sue people who operate businesses in the United States for the purpose of defrauding foreigners.

A jurisdictional bar to the application of the FTC Act in cross-border situations will lead to a substantial impairment in the reputation and credibility of *all* United States exporters. In *Branch*, the Seventh Circuit recognized that the FTC has an interest in compelling United States business persons to "use fair methods in competing with his countrymen." 141 F.2d at 34. In this case, United States franchisors who make full and adequate disclosures in selling master franchises are disadvantaged and prejudiced in competing with those who omit cautionary disclosures.

The rule established by the Eleventh Circuit would create a growth industry in United States-based fraudulent conduct. Ponzi schemes, business opportunity frauds, and bogus franchise sales would flourish, insofar as wrongdoers would have the ability to engage in deceptive and fraudulent conduct with respect to non-United States customers. For example, a business could set up shop in Miami solely for the sale of overpriced, misgraded, and/or fake gemstones to South Americans. Under the Eleventh Circuit's rule, neither the FTC nor the Florida Attorney General would be able to stop such conduct under the FTC Act or FDUPTA.

While the FTC Act does not exist to protect foreign customers, it is intended to protect United States businesses that participate in cross-border commerce. The integrity and global reputation of United States cross-border businesses would be significantly damaged if the United States were to become a safe haven for fraud directed at foreigners. The full enforcement and applicability of the FTC Act is necessary to prevent such harms to United States commerce.

CONCLUSION

For the reasons set forth above, Nieman respectfully requests that his petition for certiorari be granted.

Respectfully submitted,

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